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Supreme Court of the United States

OCTOBER TERM, 1952

No. 627

THE H. J. LEWIS OYSTER COMPANY,
Petitioner.

vs.

THE UNITED STATES OF AMERICA,
THE STATE OF CONNECTICUT, INTERVENOR,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES

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INDEX.

	PAGE
Opinion Below	1
Jurisdiction	1
Statute Involved	2
Statement of the Matter Involved	2
Questions Presented	4
Reasons for Granting the Writ	5
Conclusion	13

TABLE OF CASES CITED.

Anderson v. *Mt. Clemens Pottery Co.*, 328 U. S. 680	8
Bigelow v. *R. K. O. Radio Pictures*, 327 U. S. 251	14
Clark Lloyd Lumber Co. v. *Puget Sound & C. Ry. Co.*, 92 Wash. 601, 159 P. 774	13
Connecticut Oyster Farms Co. v. *U. S.*, 94 C. Cls. 438	12
Day v. *Woodworth*, 54 U. S. 362	13
Dixon v. *U. S.*, 103 C. Cls. 160	9
Feather River Lumber Co. v. *U. S.*, 30 F. 2d. 642	10
Lewis Blue Point Oyster Co. v. *Briggs*, 229 U. S. 82	13
Schroeder Besse Oyster Co. v. *U. S.*, 95 C. Cls. 729	14
Taylor v. *Riggin*, 40 Del. 149, 7 A. 2d. 903	10
Thomas Oyster Co., Inc. v. *U. S.*, 94 C. Cls. 432	12
Watson v. *New Milford*, 72 Conn. 561	13

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No.

THE H. J. LEWIS OYSTER COMPANY,
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vs.

THE UNITED STATES OF AMERICA,
THE STATE OF CONNECTICUT, INTERVENOR,
Respondents.

Petition for Writ of Certiorari to the Court of Claims of the United States.

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, The H. J. Lewis Oyster Company, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Claims of the United States entered on October 7, 1952, in the above entitled action.

OPINION BELOW.

The Opinion of the Court of Claims is reported in 107 F. Supp. 570.

JURISDICTION.

The date of the judgment to be reviewed is October 7, 1952. As authorized by Rule 53 of the Rules of the Court of Claims of the United States, revised May 15, 1951, a motion for rehearing and amendment of judgment was filed on November 5, 1952, and was overruled by the Court of Claims on December 2, 1952.

Jurisdiction of this Court is invoked under Section 1255 of Title 28 of the United States Code (Act of June 25, 1948, c. 646, 62 Stat. 928).

Statute Involved.

The statute involved is the Act of August 30, 1935, c. 831, Sec. 13, 49 Stat. 1049, as amended by the Act of July 13, 1943, c. 231, 57 Stat. 553 (Title 28 U. S. C., 1946 ed. Sec. 250(a)), which provided:

> "The Court of Claims shall have jurisdiction to hear and determine claims for damages to oyster growers upon private or leased lands or bottoms arising from dredging operations and use of other machinery and equipment in making such improvements."

In *Dixon* v. *U. S.*, 103 C. Cls. 160, it was held that the words "such improvements" were not limited to the specific improvements listed in the 1935 Act but applied to any river and harbor improvements and as a result the current statute (Act of June 25, 1948, c. 646, 62 Stat. 941, Title 28 U. S. C. Sec. 1497) substitutes the words "river and harbor improvements authorized by Act of Congress" for "such improvements."

Statement of the Matter Involved.

Plaintiff is a Connecticut corporation organized in 1895 and since then it has been engaged in the business of propagating and selling seed oysters. It holds a perpetual lease or license from the State of Connecticut to 5,573.2 acres of oyster grounds in Long Island Sound, of which 1,657.2 acres are located in the outer harbor near Bridgeport, Connecticut. Pursuant to Acts of Congress (Rivers and Harbors Acts approved March 2, 1945 and July 24, 1946), the defendant, through a private contractor, commenced dredging operations in Bridgeport Harbor on June 4, 1947, and completed the work on February 16, 1948. The dredging involved deepening the existing channel from 25 to 30 feet, widening it from 300 to 400 feet, and extending it seaward approximately

7,500 feet. Plaintiff thereafter instituted suit under and pursuant to the provisions of Section 250(a) of Title 28 U. S. C., 1946 edition.

In this action plaintiff claimed damages for (1) destruction of oysters by mud from the dredging operations; (2) cost of clearing the mud deposited on its beds; (3) loss of use of some beds because of the mud deposited; and (4) value of land taken by defendant in widening the channel. The Court of Claims decided that the defendant was liable to plaintiff under the provisions of Section 250(a) and held, with respect to the various items of damage with which this petition is concerned, as follows:

(1) In its consideration of plaintiff's claim for damages for the destruction of oysters, the Court held (Opinion, p. 13) that "the effect of the mud deposits was to cause the suffocation of large quantities of plaintiff's oysters", but it allowed damages only for oysters that were both killed and removed from the oyster beds (Lots 710 and 805). These damages totaled $6,125.00. Further damages amounting to a minimum of $39,932.00 for the destruction of other oysters on those same two lots were denied because of supposed uncertainty as to the number of oysters on the beds during dredging operations and uncertainty as to whether such "oysters would be removed in the future before death overtook them from natural causes".

Parenthetically, plaintiff also claimed to have proven damages amounting to $40,400.00 for the destruction of oysters on other lots, which damages were denied for the additional reason that it was uncertain as to whether the damage from the mud was the same on all of plaintiff's lots. If this petition be granted, plaintiff reserves the right, subject to the approval of this Court, to present and argue errors made in this aspect of the case.

(2) In its consideration of plaintiff's claim for damages of $51,500.00 for the extra cost of cleaning off the mud deposited on its oysters and beds by the channel dredging, the Court found that "it must be assumed that the normal operation of stirring the

deposited mud, aided by such currents, will restore plaintiff's oyster lots to their former condition". (Finding, par. 14.) This operation, as the Court of Claims indicates, is one which is part of the normal operations of the oyster business "normally performed every year before the spawning season, in order to brighten up the shells lying on the bottom for receiving the spat". (Finding, par. 14.) What the Court meant in its use of the term "normal operation" is not clear. All the evidence was to the effect that the "normal" or "usual" operation of stirring the ground would loosen the mud deposits and allow the currents to carry off the mud; it was also to the effect that this "normal" operation would have to be performed more often than usual because of the increased mud deposits. If the Court was adopting this view, it should have made findings as to the additional costs involved. If, however, the Court meant that the operation of stirring performed at its normal time would eventually clean off the mud deposits, then it should have made findings as to when that would occur. The Court did neither, but, in its opinion, in direct conflict with its finding that the normal operation, *aided by the currents*, would restore plaintiff's lots to their former condition, said that in view of the natural cleaning and scouring effect of the currents, there was no need for stirring the beds in order to remove the mud deposits.

(3) No damages for loss of use of any lots were allowed, no findings of fact were made and no discussion of this claim appears in the Court's opinion.

Questions Presented.

1. Are damages for the destruction of oysters on an underwater bed too speculative, and hence not allowable, if the existence and quantity of oysters be proven by business records of the oyster grower and estimates of its manager, rather than by the taking up and measurement of the dead oysters and shells?

2. Are damages for the destruction of oysters on an underwater bed uncertain, and hence not allowable, unless the oyster

grower proves that otherwise such oysters would have been removed from the bed before death from other causes overtook them?

3. Where channel-dredging operations deposit mud on underwater oyster beds, are damages allowable for the extra labor of stirring such beds to dislodge the mud, or must the oysterman wait until the beds are cleaned in the course of time by natural processes? If the latter be the case, is the oysterman then entitled to damages for loss of use of the oyster beds until they are cleaned by natural processes?

Reasons for Granting the Writ.

I.

In holding that plaintff is not entitled to damages for the balance of the oysters destroyed on lots 710 and 805 for the reason that plaintiff's proof is uncertain as to the number of oysters remaining on the bottom, the Court of Claims decided a federal question in a way probably in conflict with applicable decisions of this Court.

Damages were awarded by the Court of Claims for a part of the dead oysters in approximately 32,785 bushels of material removed from Lots 710 and 805 in the fall of 1947 and the first five months of 1948 (Finding, pars. 11, 12). That part was the percentage of oysters whose death was attributed to the killing effect of the mud from the channel-dredging operation. Damages were refused for any oysters similarly destroyed and not yet removed from those lots because the quantity of oysters on the lots was said to be uncertain.

The business records of plaintiff (Pl. Ex. 5) showed, with respect to Lot 710, that from 1940 through 1946, 258,591 bushels of material had been planted and 117,543 bushels of oysters and material had been removed. An accountant who examined these records for defendants testified that he had examined them for accuracy and that they were substantially correct, and no evidence contradicting these records was offered. A fair inference is that

the difference between the quantity of shell planted and the quantity of material removed, or 141,000 bushels, remained on the lot even without making any allowance for growth. The young oyster set attaches itself to the shells planted and thereafter the material removed consists of the original shell plus the set or seed oysters attached to that shell (Finding, par. 2). In July, 1947, another 18,828 bushels of shell and spawners were planted and during the fall of 1947, 19,350 bushels of material (that is, shell with oyster set attached thereto) were taken up, sample counts were made of this material, and the Court of Claims awarded damages for the death of oysters which it determined had been in that material and which had been killed by mud from the dredging operation. In the first six months of 1948 an additional 7,400 bushels of material were taken up from this lot. Since no new birth of oysters occurred between the fall of 1947 and the dates in 1948 on which this additional material was taken up, no new oysters or shell were added to that lot in that period, and since oysters, after attachment to the shell, cannot move from place to place, it is obvious that those 7,400 bushels were on Lot 710 when the damage occurred. It is also a necessary inference from the evidence that a much larger quantity of material was on this lot during the channel-dredging operation than the 19,350 bushels removed in the fall of 1947 and the 7,400 bushels removed in early 1948, and that the oysters contained in this additional material were similarly affected by the channel-dredging operation. Sitting as a jury, the Court of Claims could reasonably have determined the quantity of material, including young oyster set, on this bed, in addition to that removed, to have been 133,000 bushels, the approximate mathematical difference between plantings and harvestings, or such lesser amount as to it seemed reasonable.

Similar records maintained with respect to Lot 805 record only harvestings during recent years as that lot was used as a storage ground where small quantities of shell taken up from growing grounds in Milford and Westport were dumped (Pl. Ex. 5; Finding, par. 3). Plaintiff's manager, an oysterman of more than

forty years' experience on these very lots, estimated in May, 1947, that there were from 45,000 to 50,000 bushels of oysters in the material on this lot. This estimate was made by procedures usual in the industry and acceptable to banks making loans on oysters lying on bottoms, as well as in sales of such oysters. This evidence was not discredited nor seriously challenged and, being the only evidence available, was adequate to require a finding that there was on Lot 805 a substantial quantity of oysters, in addition to the quantity actually removed, that had been similarly damaged by the channel-dredging operations. Again it would have been a reasonable inference for the Court to have fixed this quantity at the approximate mathematical difference between the amounts estimated and removed, that is, 32,500 bushels, or such lesser amount as appeared to it to be reasonable.

The Court does not explain its failure to use this evidence and to draw reasonable inferences therefrom, other than to say "there is no way to determine the number of oysters which were on the lots in 1947, since no regular inventory is taken." (Finding, par. 4.) Obviously, it is practically impossible to take an inventory of the oysters on beds under more than twenty-five feet of water since that would require dredging up each shell and counting the individual set or seed oysters thereon. It was proven that the Bureau of Internal Revenue does not require such an inventory. See, also, I. T. 2704, XII-2 Cum. Bull. 169. The lot records kept by plaintiff and the estimates of its manager were the best available evidence and were clearly adequate to require that reasonable inferences as to the amounts of oysters contained in the material on Lots 710 and 805 be drawn by the Court. If recoveries by oyster growers under the statute (28 U. S. C., Sec. 250(a)) are to be limited or denied, unless they alter their existing business procedures and introduce a new and manifestly expensive system of taking inventories, the right and remedy which Congress intended to give them has been seriously abridged. Such a development in the law is of importance in view of the extent in this country of both oyster farming and harbor improvement, and is deserving of review by the Supreme Court.

In refusing to give effect to this evidence on the ground that it would result in speculation, the Court of Claims violated principles long established in the jurisprudence of this Court, and reiterated, in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, 688, in these words:

> "* * * Nor is such a result to be condemned by the rule that precludes the recovery of uncertain and speculative damages. That rule applies only to situations where the fact of damage is itself uncertain. But here we are assuming that the employee has proved that he has performed work and has not been paid in accordance with the statute. The damage is therefore certain. The uncertainty lies only in the amount of damages arising from the statutory violation by the employer. In such a case 'it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts.' *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, 563. It is enough under these circumstances if there is a basis for a reasonable inference as to the extent of the damages. * * *"

Where, as in this case, Congress has granted a cause of action for damages where none existed before, it would be a similar perversion of fundamental principles of justice to hold that, although the fact of damage has been proven, uncertainty in the amount of damages precludes recovery.

II.

IN HOLDING THAT A PLAINTIFF SEEKING DAMAGES UNDER THE STATUTE FOR THE DESTRUCTION OF OYSTERS HAS THE BURDEN OF PROVING THAT IF OYSTERS KILLED BY MUD FROM DREDGING OPERATIONS HAD NOT BEEN SO KILLED THEY WOULD HAVE BEEN REMOVED FROM THE BED IN THE FUTURE BEFORE DEATH OVERTOOK THEM FROM NATURAL CAUSES, THE COURT OF CLAIMS (A) DECIDED AN IMPORTANT QUESTION OF LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT, AND (B) DECIDED THIS QUESTION IN A WAY WHICH IS IN CONFLICT WITH THE DECISION OF THE QUESTION BY THE CIRCUIT COURT OF APEALS FOR THE NINTH CIRCUIT IN FEATHER RIVER LUMBER CO. V. U. S., 30 F. 2D., 642.

The Court of Claims also said that the evidence left it "* * * uncertain as to whether the oysters would be removed in the future before death overtook them from natural causes * * *." (Opinion, p. 14; Finding, par. 13.) We believe that by this, the Court meant that damages for the destruction of oysters will not be allowed unless the plaintiff proves that, were it not for their destruction by the channel-dredging, they would have continued to live until harvested, and would have been harvested. But this imposes a burden upon a plaintiff which no human being can sustain. No one but an All-Knowing Divinity can prove how many of even ten oysters lying on a bed under twenty-five feet of Long Island Sound water will be removed, before death overtakes one or more of them from natural causes. Application of a similar burden of proof would preclude recovery for the death of any growing organism, whether oysters, plants, animals or human beings, if the plaintiff in the action, in order to avoid uncertainty, had to prove that death from natural causes would not have occurred prior to the harvesting or devotion of the oyster, plant or animal to the use for which it was being grown, and, in the case of a human being, prior to the expiration of his life expectancy.

Obviously this is an important question, not only in this case but, now that Congress has given oyster growers a right of action for damages sustained in channel-dredging cases, in other probable cases. The matter should be settled by decision of this Court, particularly since the decision of the Court of Claims appears to be alone in imposing such a burden of proof upon a plaintiff, and on this point is in conflict with the decision in *Feather River Lumber Co.* v. *U. S.* (CCA 9) 30 F. 2d. 642, 644:

> "* * * Conceding it to be true, as urged by the defendant, that no one could predict what might happen to the growing timber, that another fire might have swept over it at the same time, or shortly after, or the next year, or before it attained its full growth, it is nevertheless not believed that the measure of damages adopted was for that reason erroneous, or that it is to be held that the damages sustained by loss of property destroyed by a fire is to be diminished by the fact that it might have been otherwise destroyed."

The impact of this rule, if adopted in cases involving the death of human beings, is pointed out in *Taylor* v. *Riggin*, 40 Del. 149, 154, 7 A. 2d. 903:

> "The defendant questioned the fact that the Deceased might not live out the term of his expectancy.
>
> "If the position of the defendant be tenable, no damages based upon the expectancy of life could ever be recovered resulting from the death of an infant. In no case could it be certainly affirmed that the Deceased, if he had not met with an injury which caused his death, would not have died the next day from some other cause."

Furthermore, the only relevance which the natural mortality of oysters has is on the question of value. The Court of Claims made a finding as to the natural mortality of oysters in Long Island Sound (Finding, par. 5), and it made findings as to the values of the oysters on Lots 710 and 805 (Finding, pars. 11, 12). Obviously the natural mortality of a certain lot of oyster set or seed oysters is a material fact in determining its value at a particular time and there is nothing to show that this fact was not considered

in determining the values in this case. Certainly the existence of a mortality from natural causes does not preclude any recovery whatsoever, as the Court of Claims has held in this case.

III.

IN HOLDING THAT PLAINTIFF'S CLAIM FOR THE EXTRA WORK INVOLVED IN STIRRING ITS OYSTER BEDS IN ORDER TO LOOSEN THE MUD DEPOSITS SO THAT THE CURRENTS WOULD CARRY THE MUD AWAY WAS NOT ALLOWABLE, THE COURT OF CLAIMS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

The Court of Claims found as a fact that the normal scouring of the currents is the primary agency for removing any silt deposited from the dredging and that *stirring* the deposited mud, *aided by the currents*, will restore plaintiff's oyster lots to their former condition (Finding, par. 14). This finding is in accord with all the evidence on this issue which was to the effect that the mud deposits had to be loosened up by dredging or stirring so that the currents could carry away the loosened mud or silt. However, in its opinion, the Court rejected the claim that stirring was necessary for removing the mud deposits "in view of the natural cleaning and scouring effect of the turbid harbor waters upon the beds". Obviously, in its opinion the Court views the currents as the sole agency necessary to remove the mud deposits. That is directly contrary to all the evidence on this issue and to its own finding of fact.

In prior cases the Court of Claims has made similar findings of fact to the additional expenses involved in removing mud and has taken those expenses into consideration in fixing the amount of damages:

> "25. Plaintiff, in the spring of 1934, began cleaning off lot 324 and continued such cleaning operations from time to time for several years thereafter, consuming altogether in such work about 90 days during each of which plaintiff used its dredge boat with a crew of four deck hands and a captain.

The cost of operating plaintiff's dredge boat was $50 a day. The additional expense for the extra work in these cleaning operations removing mud and dead oysters was $3,600.

"By reason of the manner in which the injury occurred and upon the evidence proffered, it is not possible to determine with exactness the quantity of oysters destroyed. Considering all the evidence presented and taking into consideration all circumstances, including expenditures by plaintiff in cleaning its lot of mud deposited thereon by defendant's dredging operations, the Court finds that because of defendant's negligence plaintiff sustained damages in the amount of $14,000." *Thomas Oyster Co., Inc.* v. *U. S.*, 94 C. Cls. 432, 434.

"26. In the spring of 1936 plaintiff dredged and agitated the bottom of lot 134, partially for the purpose of preparing the bottom for the regular planting of shells and partially for the purpose of removing silt deposited thereon by defendant's dredging operations. Plaintiff worked with three oyster dredge boats, each manned with a captain and four workmen, for a period of two weeks at a cost of $50 a day. Not more than one-third of the cost of this operation was attributable to the cleaning of mud deposited by defendant's dredging operations.

"After removal by plaintiff of mud and silt, as described above, lot 134 was suitable for oyster cultivation.

"Considering all the circumstances, including expenditures by plaintiff in cleaning its lot of mud deposited thereon by defendant's dredging operations, the Court finds that because of defendant's negligence plaintiff sustained damages in the amount of $1,200."

Connecticut Oyster Farms Company, 94 C. Cls. 438-9.

The allowance of these expenses as an item of damage is an application of the general rule that where the property can be restored to its condition prior to the injury, the cost of restoration is a proper item of damage:

"The measure of damages, where a removable thing is put upon property that menaces or destroys its use, is the reason-

able cost of removing it. * * *" *Clark Lloyd Lumber Co.* v. *Puget Sound & C. Ry. Co.*, 92 Wash. 601, 607, 159 P. 774, 776.

"Proof of what it would cost to clean up the premises by removing the offensive deposits was relevant to the question of damages."

Watson v. *New Milford*, 72 Conn. 561, 566.

The decision of the Court of Claims in this case is likewise contrary in principle to the decision of this Court in *Day* v. *Woodworth*, 54 U. S. 362, where this Court approved a jury charge to the effect that if the defendant had taken down more of a dam than was necessary, "the jury would allow in damages the cost of replacing such excess, * * *".

If it must be assumed, contrary to both the evidence and the finding of fact, that the currents will eventually clean the mud deposits from the oysters and the beds, then the Court of Claims should have made a finding as to how long this would take and the plaintiff should be awarded damages for the loss of use of all these lots during such period as it would take the currents by themselves to restore plaintiff's lots to their former condition. The two items of damage are clearly alternative: if plaintiff expends money to loosen up the mud so that the currents can carry it away, it is entitled to recover those expenditures; if, on the other hand, plaintiff is compelled to wait until the currents by themselves have cleared the mud away—assuming, of course, that they can do so—it is entitled to damages for its loss of use of the lots in the interim. Plaintiff knows of no requirement that it wait, but submits that damages for loss of use are the logical and just result of the Court's position.

Conclusion.

In the absence of statute there is no right to any damages for injury from dredging operations. *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U. S. 82. Congress determined that such a right should be granted, and by Section 250(a), its predecessors and

successor, it has granted the right and conferred exclusive jurisdiction upon the Court of Claims to enforce that right. The right is an absolute one, not conditioned on proof of negligence. *Schroeder Besse Oyster Co.* v. *U. S.*, 95 C. Cls., 729. It is therefore of the utmost importance that such right should not be completely destroyed or even limited by that Court's imposition of an impossible burden of proof and the application of erroneous principles of law relating to damages which result in an arbitrary denial of the right to damages. The importance of the problem presented where the sole quetsion was whether the evidence of damage was sufficient to support a jury's verdict was recognized by this Court as a basis for the granting of certiorari in *Bigelow* v. *R.K.O. Radio Pictures*, 327 U. S. 251, 254.

The arbitrary position taken by the Court of Claims denied this plaintiff a fair hearing and nullified the Act of Congress. Unless this Court reviews the decision of the Court of Claims, this plaintiff, and any other oyster growers injured by dredging operations, will be deprived of the right to adequate damages which the statute purports to give. The nullification of statutory rights to damages by impossible and arbitrary rules of procedure and of evidence is a perversion of the judicial process and a deprivation of those rights without due process of law.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	5
Conclusion	11

Cases:

Anderson v. *Mt. Clemens Pottery Co.*, 328 U.S. 680	7
Beacon Oyster Co. v. *United States*, 105 C. Cls. 227	6, 10
Connecticut Ry. Co. v. *Palmer*, 305 U.S. 493	8
Dixon v. *United States*, 103 C. Cls. 160	7
Eastman Kodak Co. v. *Southern Photo Materials Co.*, 273 U.S. 359	8
F. Mansfield & Sons Co. v. *United States (The Oyster Cases)*, 94 C. Cls. 397	5, 6, 9
Gange Lumber Co. v. *Rowley*, 326 U.S. 295	8
Jacobson v. *Coon*, 165 F. 2d 565	8
L. Albert & Son v. *Armstrong Rubber Co.*, 178 F. 2d 182	6
Lewis Blue Point Oyster Co. v. *Briggs*, 229 U.S. 82	7
Lubetich v. *United States*, 315 U.S. 57	8
Missouri Pac. R. R. Co. v. *Ault*, 256 U.S. 554	7
Radel Oyster Co. v. *United States*, 78 C. Cls. 816	5, 7, 8
Sachs v. *Bose*, 201 F. 2d 210	10
Schroeder Besse Oyster Co. v. *United States*, 95 C. Cls. 729	7, 8
Seipp v. *United States*, 107 C. Cls. 210	5
Thomas v. *Ocean City Automobile Bridge Co.*, 108 N.J. L. 143	9
United States v. *Penn Mfg. Co.*, 337 U.S. 198	8
United States v. *Smith*, 94 U.S. 214	7
United States v. *Wyckoff Co.*, 271 U.S. 263	7

Statutes:

Act of March 2, 1945, 59 Stat. 10, 13	4
Act of August 30, 1935, P.L. 409, 74th Cong., 1st sess., 49 Stat. 1049, Sec. 13, as amended, 57 Stat. 553 (Section 250a of 28 U.S.C., 1946 Ed., now 28 U.S.C., 1946 Ed., Supp. V, 1497)	2, 5

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 627

THE H. J. LEWIS OYSTER COMPANY, *Petitioner*

v.

THE UNITED STATES OF AMERICA,
THE STATE OF CONNECTICUT, *Intervenor*

On Petition for a Writ of Certiorari to the United States Court of Claims

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 19-33) is reported at 107 F. Supp. 570.

JURISDICTION

The judgment of the Court of Claims was entered October 7, 1952 (R. 33). A timely motion for rehearing (R. 33-34) was overruled by the Court of Claims on December 2, 1952 (R. 34). The

jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

In a suit under 28 U.S.C., 1946 Ed., 250a (now 28 U.S.C., 1946 Ed., Supp. V, 1497), what evidence is required to establish the extent of the damages to petitioner's oyster grounds resulting from government dredging operations in connection with harbor improvements.

STATUTE INVOLVED

Section 13 of the Act of August 30, 1935, P.L. 409, 74th Cong., 1st sess., 49 Stat. 1049, as amended, 57 Stat. 553 (Section 250a of 28 U.S.C., 1946 Ed.) provides:

> That the Court of Claims shall have jurisdiction to hear and determine claims for damages to oyster growers upon private or leased lands or bottoms arising from dredging operations and use of other machinery and equipment in making such improvements: * * *[1]

STATEMENT

In the propagation of seed oysters, petitioner leased a total of 5573.2 acres of oyster grounds from the State of Connecticut, 1657.2 acres of which were located in the outer harbor near

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[1] Section 250a of 28 U.S.C. is in substance reenacted in the new Judicial Code, 28 U.S.C., 1946 Ed., Supp. V, 1497.

Bridgeport. The other leased grounds were located at Westport, Milford, West Haven and New Haven. Affiliates of petitioner leased and operated oyster grounds at Shelter Island and Greenport on Long Island. The Bridgeport oyster grounds were used to obtain set (the very young oyster) and to produce seed oysters. The grounds at Milford and Westport were used for growing, and the grounds on Long Island were used to fatten the oysters prior to sale on the commercial market. (Finding 1, R. 19.)

The oyster spawning season in Bridgeport occurs during the latter part of July and in August. During the last week in June and the first week in July, oyster shells are planted in the grounds. The oyster spawn attaches itself to the shells and the spat (the spawn after it is attached to the shell) is not disturbed until it is large enough for transfer to the growing grounds. The set is usually shifted to the growing grounds the autumn following the spawning season or in the spring of the next year. During the annual transplanting it is economically unfeasible to remove all the set. (Finding 2, R. 19-20.)

The petitioner was acquired by its present owners in 1944. No inventory of the oysters on the lots in Bridgeport was then taken. No regular inventory is taken and no way exists to determine the number of oysters on the lots in 1947. The petitioner's lot records reveal only the total amount of

both oysters and shell on the lots. No record is kept of the annual set nor do the captains of the oyster boats make a regular count of the number of live and dead oysters taken up in oyster dredging operations. (R. 20.)

Pursuant to congressional authorization (Act of March 2, 1945, 59 Stat. 10, 13) the Government commenced dredging operations to improve the channel into Bridgeport Harbor on June 4, 1947, which were completed on February 16, 1948. According to petitioner's dredging captains, petitioner's dredging operations in 1947 and 1948 encountered considerably more mud than in normal years. However, accurate determination of the amount of mud produced by the dredging and of the mud due to other causes was impossible. Petitioner's practice of placing oysters in ridges a foot or more thick inevitably resulted in covering the oysters toward the bottom of the pile with mud produced by the oysters toward the top of the pile. (R. 21, 25.) Moreover, a storm like that of November 1947 stirs up material on the shores and bottom of a body of water and thereafter, when the storm subsides, increases the turbidity of the water and the deposit of solid material on the bottom (R. 25). Of the only two lots in question from which oysters were dredged by petitioner in the fall of 1947 and the first part of 1948 (R. 31), the usable part of lot 805 lies about 2000 feet from the dredged channel; all of lot 710 lies more than two miles from the dredged channel.

Petitioner brought suit in the Court of Claims for $486,625.00 (R. 1-4), thereafter reduced to $194,057.00, under 28 U.S.C., 1946 Ed., 250a. Judgment was entered in petitioner's favor of $6,399.56, composed of $4,000.00 for compensation for oysters killed on one set lot (lot 710), $2,125.00 for oysters killed on another set lot (lot 805), and $274.56 as the value of some acreage in lots 815 and 816 rendered permanently useless for oyster planting by the enlargement of the channel.[2] The Court of Claims rejected the claims for damages to the other lots as too speculative and for the alleged cost of cleaning the oyster beds as unnecessary.

ARGUMENT

The amount of damages the evidence supports or requires for injury to oyster beds in the circumstances of a particular case presents no question of general importance suitable for review by this Court. No conflict of authority exists or is alleged, for cases of this type are confined to the Court of Claims. 28 U.S.C., Supp. V, 1497. The Court of Claims has not been exacting in its requirements of proof of damages in oyster cases (see *Seipp* v. *United States,* 107 C. Cls. 210, 219; *The Oyster Cases,* 94 C. Cls. 397; *Radel Oyster Co.* v. *United*

[2] Judgment for $6,399.56 was entered in favor of the United States against the intervenor State of Connecticut, which, pursuant to an Act of its General Assembly, had agreed to hold the United States free from damages resulting from the improvement of the harbor. (R. 5-9, 22-24, 33.)

States, 78 C. Cls. 816, 828-9), and it is apparent that, following its own precedents (R. 31-2),[3] it adheres to a formula not only liberal but generous to claimants. However, in appraising the facts in this case it held that under that generous formula, as to *some items of claim,* in contrast to others in the case for which damages were awarded, petitioner's proof did "not satisfy even these meager requirements" (R. 32).

The Court of Claims' findings were reasonably adapted to the circumstances of the case. They evince the court's concern with allowing petitioner all its provable losses while denying a windfall award that would put petitioner in a better position than if the Government's dredging operations had never been conducted. Cf. *L. Albert & Son* v. *Armstrong Rubber Co.,* 178 F. 2d 182, 191 (C.A. 2). If oyster raising is a hazardous business, its hazards cannot be removed nor ignored in considering the injury sustained from dredging operations.

Petitioner concedes (Pet. 13) that "In the absence of statute there is no right to any damages for injury from dredging operations." Nevertheless, it takes the view that upon the Government's acceptance of liability, regardless of negligence, in

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[3] *The Oyster Cases,* 94 C. Cls. 397, 420-1 ("All that is required is the allowance of such damage as, in the judgment of fair men, directly and naturally resulted from the injury sustained."); *Beacon Oyster Co.* v. *United States,* 105 C. Cls. 227.

the 1935 Act,[4] claimants may be relieved of establishing the loss due to dredging operations that would not have been incurred independently of the dredging. As negligence is not an element in petitioner's claim, the Government is not really a wrongdoer[5] so as to give color to petitioner's plea that it receive the benefit of uncertainty and the equivalent of punitive damages against the United States. *Missouri Pac. R.R. Co.* v. *Ault*, 256 U.S. 554. "More than compensation for damages actually sustained can never be awarded against the United States." *United States* v. *Smith*, 94 U.S. 214, 218-219; *United States* v. *Wyckoff Co.*, 271 U.S. 263. Accordingly, petitioner must prove that it sustained injury to its oysters or oyster grounds and that the injury was directly attributable to the dredging operations.

Uncertain and speculative damages cannot be recovered "where the fact of damage is itself uncertain." *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 688. The court below properly held that, while inability to calculate damages with mathematical certainty will not bar recovery, that principle is not a substitute for proof nor will it dispense with proof of damages due to dredging "as a matter of just and reasonable inference." *Ander-*

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[4] *Dixon* v. *United States*, 103 C. Cls. 160, 165; *Schroeder Besse Oyster Co.* v. *United States*, 95 C. Cls. 729, 738; cf. *Radel Oyster Co.* v. *United States*, 78 C. Cls. 816, 823-4.

[5] See *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U. S. 82.

son v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 687. No damages for which a fair approximation might be made were denied. Cf. *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359, 379. However, speculative damages are not allowable. *Schroeder Besse Oyster Company, Inc.* v. *United States*, 95 C. Cls. 729, 740; cf. *Connecticut Ry. Co.* v. *Palmer*, 305 U.S. 493, 504-5. Petitioner in effect would require the trial court to assume that losses otherwise expectable were nevertheless proximately caused by dredging operations as a matter of law.[6]

It is known that oysters die for a number of reasons having nothing to do with government dredging, as the Court of Claims found (R. 20-21). In the best of circumstances "(t)he propagation of oysters is difficult and uncertain." *Radel Oyster Co.* v. *United States*, 78 C. Cls. 816, 818. Petitioner asks that the Court of Claims be made oblivious of the plain facts of oyster life and culture and assigns as error its failure to award speculative damages based on guesswork (*United States* v. *Penn Mfg. Co.*, 337 U.S. 198; cf. *Gange Lumber Co.* v. *Rowley*, 326 U.S. 295) in disregard of the many significant contingencies. Cf. *Jacobson* v. *Coon*, 165 F. 2d 565, 568 (C.A. 6).

A high rate of oyster mortality was a probable

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[6] Since petitioner has not specified the evidence justifying reversal (cf. *Lubetich* v. *United States*, 315 U.S. 57, 58), he cannot have this Court reevaluate the damages.

occurrence, even in the absence of the special factors. In dealing with large numbers of oysters, it is unreasonable to suppose, disregarding oyster mortality, that all petitioner's oysters would reach maturity when the time for removal came, and, in disregard of petitioner's and the industry's experience and practices and against all the probabilities, that all petitioner's live oysters which lived out their span would have been gathered for sale. If petitioner is relieved from establishing the existence and extent of damages due to the dredging operations, the measure of recovery is converted from the actual loss due to the dredging operations on the generous formula of *F. Mansfield & Sons Co.* v. *United States* (*The Oyster Cases*), 94 C. Cls. 397, to the loss contemporaneous with such operations. This Court cannot be asked to declare that petitioner should be credited with the ability and the disposition to remove all the oysters that were destroyed, despite evidence to the contrary, to weigh the evidence in a voluminous record and accept conclusions that were not persuasive to the Court of Claims, or to pile inferences on inferences to justify judgment for petitioner in a greater amount. These matters are for the trier of the facts. *Thomas* v. *Ocean City Automobile Bridge Co.*, 108 N.J. L. 143.[7]

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[7] In essence, petitioner urges that what "[s]itting as a jury, the Court of Claims could reasonably have determined" (Pet. 6) it was under a positive duty to find as a fact, although

The waters of Bridgeport Harbor are normally turbid and the process of sedimentation is continuous. The waters are polluted by discharges of untreated sewerage and factory wastes. The commercial feasibility of oyster growing in Bridgeport Harbor apparently is attributable to the continual scouring effect of the tides and the currents (Finding 14, R. 27) and the fact that oysters will survive unless they are completely buried by mud (Finding 8, R. 24).[8] The criticism of the denial of damages on the item for the cost of removing mud which the current and petitioner's ordinary operations would perform, is plainly captious.[9] It would aggravate damages to duplicate the work of the current.[10]

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the case was fully tried and not dismissed on motion for failure to make out a *prima facie* case. Cf. *Sachs* v. *Bose*, 201 F. 2d 210 (C.A.D.C.).

[8] See also *Beacon Oyster Company* v. *United States*, 105 C. Cls. 227, 231.

[9] Lots 729, 810, 815, 831, and 833 had been cultivated before World War II but none of them had been planted with shell since 1942. Lots 834, 835, 836, and 838 have never been cultivated. Thus, some of those oyster beds petitioner says that it will clean some day have not been cultivated for years and perhaps will never be cultivated again. (R. 20.)

[10] Despite the normal turbidity of the water, the currents of Bridgeport Harbor have prevented any appreciable siltation over the years (Fdg. 14, R. 27). There has thus been no appreciable change in the contours of the harbor bed over the years (Fdg. 9, R. 25).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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CERTIORARI DENIED